

Is Yale Kamisar as Good as Joe Namath?: A Look Back at Kamisar's "Prediction" of *Miranda v. Arizona*

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Three days before Super Bowl III, Joe Namath, "with a double scotch in his hand,"¹ guaranteed that the New York Jets would beat the Baltimore Colts. The Jets were eighteen point underdogs, but Namath predicted, "we'll win, I guarantee it."² In 1969, some thought that Namath was a brash, loud-mouthed quarterback, and his victory boast provoked scorn and laughter. But Namath and the Jets backed up Broadway Joe's guarantee and many believe that Super Bowl III was "one of the most important games in the history of the National Football League."³

Four years before Broadway Joe and the Jets whipped the Colts in Super Bowl III, Yale Kamisar may have accomplished the academic equivalent of Joe Namath's "guarantee," albeit with less fanfare than Namath's boast. In the fall of 1965, the justices of the United States Supreme Court had resolved to "finally deal with [a] criminal justice problem that had haunted the . . . Court for decades—confessions."⁴ On November 22, the Court agreed to review *Miranda v. Arizona*⁵ together with three other cases.⁶ *Miranda*⁷ and its companion cases went on to become one of the most important and famous rulings in the Court's history.⁸ But before the confessions cases were decided, Kamisar wrote a ninety-five page

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¹ Robert Lipsyte, *Sports of the Times, Broadway Joe Is No. 1*, N.Y. TIMES, Jan. 13, 1969, at 33.

² *Id.*

³ Scott Adamson, *The Bowl that Made It Super*, SCRIPPS HOWARD NEWS SERV., Jan. 27, 2004 (explaining that Super Bowl III was "one of the most important games in the history of the National Football League[,] because it precipitated the merger between the American and National Football Leagues), available at LEXIS, News Library, SCHWRD File.

⁴ FRED P. GRAHAM, THE SELF-INFLICTED WOUND 154 (1970).

⁵ 382 U.S. 925 (1965).

⁶ *California v. Stewart*, 382 U.S. 937 (1965); *Vignera v. New York*, 382 U.S. 925 (1965); *Westover v. United States*, 382 U.S. 924 (1965).

⁷ 384 U.S. 436 (1966).

⁸ See JETHRO K. LIEBERMAN, MILESTONES—200 YEARS OF AMERICAN LAW vii (1976) (listing *Miranda* as the fourth most important event in American legal history). The public's initial response to *Miranda* was mostly negative. Indeed, many in the legal profession criticized the ruling. A few months after *Miranda* was decided, Kamisar observed that the ruling "has evoked much anger and spread much sorrow among judges, lawyers and professors." Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966).

article that provided the intellectual foundation for *Miranda*.⁹ Like Broadway Joe when he guaranteed a win for the Jets in Super Bowl III, Kamisar accurately “predicted” what the Court would do in the confessions cases.

While many feared that the Court was poised to ban all police custodial interrogation,¹⁰ Kamisar advised, “I would not abolish all in-custody police interrogation.”¹¹ A few months later, the *Miranda* Court stated, “we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement.”¹² Kamisar explained, however, that he “would bar . . . the all too prevalent in-custody interrogation which takes place under conditions undermining a suspect’s freedom to speak or not to speak—and the all too prevalent questioning of those who are unaware and uninformed of their rights.”¹³ The Court agreed with Kamisar and ruled that the confessions in *Miranda* and its companion cases were inadmissible at trial because they “share[d] salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.”¹⁴

Kamisar also maintained that the Constitution did not impose a duty on police officials to prevent a suspect from incriminating himself. He did, however, contend that the state “must ensure that the suspect is aware that he need not, and

⁹ Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, From Escobedo to . . .*, in CRIMINAL JUSTICE IN OUR TIME 1–95 (A.E. Dick Howard ed., 1965). A reliable source informs me that the original title of this article used the phrase “Equal Justice in the Outhouses and Penthouses of American Criminal Procedure,” but Kamisar changed the title when Professor Arthur E. Sutherland told him that title was too inelegant. As soon as Sutherland suggested the “Gatehouses and Mansions” metaphor, Kamisar knew that was a more appropriate title. The “Gatehouses and Mansions” was a better metaphor than the “Outhouses and Penthouses” because you had to go through the gatehouse to get to the mansion, just as a criminal suspect has to go through the stationhouse before he gets to the courtroom, where he has greater legal protection. At the same time that Kamisar was composing the *Gatehouses and Mansions* article, Professor Sutherland was also working on an article about police interrogation methods. See Arthur E. Sutherland, *Crime and Confessions*, 79 HARV. L. REV. 21 (1965). Professor Sutherland’s article was also cited by the *Miranda* Court. See *Miranda*, 384 U.S. at 457 n.26.

¹⁰ See, e.g., GRAHAM, *supra* note 4, at 61–62 (noting that after the Court had heard arguments in *Miranda* and its companion cases, three of the nation’s most respected state court jurists “spoke publicly in anticipation of [*Miranda*], asking the Court to stay its hand”). These judges were worried that the Court would impose rules that would severely hamstring police interrogation methods. *Id.*; see also Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 10 (1995) (noting that Judges Charles Breitell, Henry Friendly, Walter Schaefer and Roger Traynor spoke at public lectures on the eve of *Miranda* and “urged the Court to turn back or at least to reconsider where it was going”) (footnote omitted).

¹¹ Kamisar, *supra* note 9, at 10 (acknowledging that interrogation “leads to the precharge release of many lawfully arrested persons and to reduced charges in other cases,” and that “although [confessions] are too often the product of compulsion—more often than defendants can prove—damaging statements are also the product of conscience, remorse, even calculation”).

¹² *Miranda*, 384 U.S. at 478.

¹³ Kamisar, *supra* note 9, at 10.

¹⁴ *Miranda*, 384 U.S. at 445.

cannot be made to, incriminate himself.”¹⁵ He also asserted that “so far as it is reasonably possible[,] the state can and should ensure that the choice of the weak and the ignorant and the poor to speak or not to speak is as free and as informed as that of their more fortunately endowed brethren.”¹⁶ Finally, Kamisar noted that because “important consequences flow from a suspect’s request for counsel, all suspects should be made aware that they may make such a request.”¹⁷

Miranda embraced each of these positions. Because “[t]he privilege against self-incrimination secured by the Constitution applies to all individuals,”¹⁸ every arrestee subject to custodial interrogation must be informed of his right to remain silent and told that anything he says to the police can be used against him at trial.¹⁹ Moreover, every arrestee, whether rich or poor, must be informed of his right to counsel, including that if he cannot afford counsel, a lawyer will be appointed to represent him before and during interrogation.²⁰ For, as the Court recognized, “the warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present.”²¹

Yale Kamisar’s extraordinary contributions and impact on modern American constitutional criminal procedure are unequalled. He has written and lectured cogently about the Fourth and the Sixth Amendments.²² He may be best known,

¹⁵ Kamisar, *supra* note 9, at 10.

¹⁶ *Id.*

¹⁷ *Id.* at 11.

¹⁸ *Miranda*, 384 U.S. at 472.

¹⁹ *Id.* at 467–68.

²⁰ *Id.* at 473.

²¹ *Id.* (footnote omitted).

²² Kamisar’s law review articles, book chapters and legal essays on constitutional criminal procedure are too numerous to cite in this forum. Although not as well known as his Fifth Amendment articles, Kamisar’s articles on the Fourth Amendment are extremely thoughtful and informative. For example, I learned many things about the Court’s Fourth Amendment jurisprudence and the history of the exclusionary rule by reading the following: Yale Kamisar, “*Comparative Reprehensibility*” and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1 (1987); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather than an “Empirical Proposition”?*, 16 CREIGHTON L. REV. 565 (1983); Yale Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959). When I first began teaching criminal procedure, Kamisar’s article on probable cause was particularly helpful in structuring my classroom notes and teaching me about the Court’s approach to probable cause. See Yale Kamisar, Gates, “*Probable Cause*,” “*Good Faith*,” and *Beyond*, 69 IOWA L. REV. 551 (1984). Before *Gideon v. Wainwright*, 372 U.S. 335 (1963), was decided, Kamisar wrote several informative and influential articles on the Sixth Amendment right to counsel clause. See Yale Kamisar, *Betts v. Brady, Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219 (1962); Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on the Most Pervasive Right of an Accused*, 30 U. CHI. L. REV. 1 (1962). The latter article was cited by the Court in *Gideon*. See *Gideon*, 372 U.S. at 338 n.2. His articles on *Brewer v. Williams*, 430 U.S. 387 (1977), the “Christian Burial Speech” case are classics. See Yale Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is “Interrogation”? When Does it Matter?*, 67

however, for his scholarship on the Fifth Amendment's privilege against self-incrimination generally, and his writings about police interrogation methods specifically. Indeed, his scholarship on *Miranda v. Arizona* has influenced (and provoked) two generations of Supreme Court justices, lower court judges, and hundreds, if not thousands, of academic scholars and law enforcement officials.²³

Kamisar's writings on police interrogations, confessions, and constitutional law are legendary. Rather than consider the breadth and scope of Kamisar's scholarship, which spans over forty years and continues today,²⁴ I will examine a single essay written by Kamisar during the salad days of his thinking about police interrogations. *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell To Gideon, From Escobedo To . . .* is an extraordinary article, which provides the groundwork for Kamisar's "prediction" about what the Court would do in *Miranda*. One of three essays published in a 1965 book edited by A.E. Dick Howard, entitled *Criminal Justice in Our Time, Gatehouses and Mansions* was not Kamisar's first venture into the then and still controversial topic of police interrogation and the Constitution. Kamisar began writing *Gatehouses and Mansions* one year after he had published an article on the

GEO. L.J. 1 (1978) [hereinafter *When Does It Matter?*]; Yale Kamisar, *Foreword: Brewer v. Williams—A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209 (1977) [hereinafter *A Hard Look*]. Of course, Kamisar is a co-author of the most widely used casebook on constitutional criminal procedure. See YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE: CASES—COMMENTS—QUESTIONS* (10th ed. 2002) [hereinafter *MODERN CRIMINAL PROCEDURE*]. He is also a co-author of a popular casebook on constitutional law. See JESSIE H. CHOPER ET AL., *CONSTITUTIONAL LAW* (9th ed. 2001).

²³ Professor Stephen Schulhofer has described Kamisar as "a leading force in the *Miranda* 'revolution' of the 1960s." Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 866 (1981). In 1970, when the curtain had fallen on the Warren Court and its due process revolution, Fred Graham described Kamisar as "one of the scrappiest combatants on the liberal side" of the due process revolution. GRAHAM, *supra* note 4, at 286. While the Burger and Rehnquist Courts have quelled the *Miranda* revolution specifically and the Warren Court's due process revolution generally, Kamisar remains a prolific and respected scholar in the seemingly never-ending debate over the proper balance between individual liberties and law enforcement.

²⁴ Although sometimes great athletes are said to have "lost a step" as they get older, time has not affected the quality or productivity of Kamisar's scholarship. He is still "mixing it up" with the Court and individual justices, *see, e.g.*, Yale Kamisar, *Foreword: From Miranda to §3501 to Dickerson to . . .*, 99 MICH. L. REV. 879 (2001); Yale Kamisar, *Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L.J. 387, 401–25 (2001) [hereinafter *Thirty-Five Years Later*] (critiquing Justice Scalia's dissent in *Dickerson v. United States*, 530 U.S. 428 (2000)), and other scholars and judges, *see, e.g.*, Yale Kamisar, *The Calabresi–Kamisar Debate on the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119 (2003); Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. REV. 883 (2000) (critiquing arguments that Congress could overrule *Miranda* by statute); Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 936 (1995); Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REFORM. 537 (1990) [hereinafter *Remembering the "Old World"*].

meaning of involuntary confessions.²⁵ In 1965, Kamisar may have “had no intention of starting on another piece about the subject [of police interrogations and the Constitution] so soon,”²⁶ but thankfully, he changed his mind. *Gatehouses and Mansions* is a *tour de force*.

Gatehouses and Mansions was written during an exciting and uncertain era in the development of constitutional criminal procedure. For many years, the Court had analyzed the constitutional validity of police interrogation methods on a case-by-case basis. Starting in the 1930s and continuing through the early 1960s, the Court avoided broad edicts and bright-line rules about the limits of police interrogation tactics. To be sure, the Court ruled in favor of many defendants who had challenged the constitutionality of their police interrogation practices during this thirty-year period. Nonetheless, although the Court led by Chief Justice Earl Warren seemed less tolerant of police interrogation methods than its predecessor, as late as 1963 it had imposed no significant obstacle in the path of police officers interrogating arrestees.²⁷

In 1964, however, things changed dramatically. First came *Massiah v. United States*.²⁸ In *Massiah*, the Court ruled that the Sixth Amendment right to counsel barred the government from using at trial incriminating statements that federal agents had deliberately (and surreptitiously) elicited from a defendant after he had been indicted and in the absence of counsel.²⁹

Then, one month later, came *Escobedo v. Illinois*.³⁰ *Escobedo*, like *Massiah*, relied on the Sixth Amendment right to counsel. But its holding and meaning were not—and never have been—clear.³¹ The only thing certain about *Escobedo* was

²⁵ Yale Kamisar, *What is an “Involuntary” Confession? Some Comments on Inbau and Reid’s Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963).

²⁶ YALE KAMISAR, *POLICE INTERROGATION AND CONFESSIONS* xi (1980) [hereinafter *POLICE INTERROGATION*].

²⁷ See, e.g., *Haynes v. Washington*, 373 U.S. 503 (1963). The *Haynes* Court did not require that police warn suspects of their right to remain silent or right to consult with counsel, or even that officers refrain from questioning when a suspect indicates an unwillingness to speak with police. Rather, the Court only ruled that Haynes’ confession was involuntary under the Due Process Clause of the Fourteenth Amendment because Haynes had been subjected to continuous questioning and was not permitted to call his wife until he agreed to cooperate with the police and make a written statement admitting his participation in a robbery.

²⁸ 377 U.S. 201 (1964).

²⁹ *Id.* at 206.

³⁰ 378 U.S. 478 (1964). In the interim between *Massiah* and *Escobedo*, *Malloy v. Hogan*, 378 U.S. 1 (1964), was decided. *Malloy* held that the Fifth Amendment’s Self-Incrimination Clause was applicable to the States. As Professor Lawrence Herman aptly described it at the time, *Malloy* conducted “what might have seemed to some a shotgun wedding of the privilege [against self-incrimination] to the confessions rule” of the Due Process Clause of the Fourteenth Amendment. Lawrence Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 465 (1964).

³¹ See Kamisar, *supra* note 9, at 53 (“In a 5–4 opinion, the Supreme Court . . . struck down *Escobedo*’s confession. At this juncture that is about all one can say about the case without getting into an argument.”).

the Court's conclusion that Escobedo's confession, taken during a police interrogation while he was under arrest and after he had requested and been denied access to his lawyer, was inadmissible at his trial.

Massiah and *Escobedo* together generated enormous uncertainty as to the permissible methods law enforcement officers could undertake when interrogating a person suspected of criminal activity. In particular, *Escobedo* raised several questions, including "who" was protected by its holding, "when" the right to counsel was triggered, and "what" the scope of the right to counsel was. In *Gatehouses and Mansions*, Kamisar modestly described his goal as "to dwell on one piece of unfinished right-to-counsel business—the stage at which the state must first provide an indigent person with a lawyer."³² Although Kamisar begins his essay in modest fashion, it is anything but unassuming. Kamisar provides the reader with a scholarly, yet pragmatic, analysis of the then-clandestine world of police interrogation. The reader is given a detailed discussion of legal history, Supreme Court rulings, and lawyerly arguments about the pros and cons of police interrogation methods. Kamisar forces the reader to reconcile the practice of coercing confessions with the Fifth Amendment's privilege against compelled self-incrimination. After contrasting the many constitutional protections afforded the accused at trial (the "mansion") with the meager protections existing in the interrogation room (the "gatehouse"), Kamisar commented:

True, the man in the street would have considerable difficulty explaining why the Constitution requires so much in the courtroom and means so little in the police station, but that is not his affair. "The task of keeping the two shows going at the same time without losing the patronage or the support of the Constitution for either," as Thurman Arnold once observed, is "left to the legal scholar." Perhaps this is only fitting and proper, for as Thomas Reed Powell used to say, if you can think about something that is related to something else without thinking about the thing to which it is related, then you have the legal mind.³³

Kamisar's writing is forthright,³⁴ his use of imagery brilliant, and his arguments are forceful and compelling.³⁵ In short, Kamisar's essay "addresses the

³² *Id.* at 9.

³³ *Id.* at 21 (footnotes and citations omitted).

³⁴ *See, e.g., id.* at 13:

For amid all the sound and fury one point is plain: in the absence of judge and jury, law enforcement officers [during interrogation sessions] can—and without hesitation do—resort to methods they would never consider utilizing at the trial; the case for the prosecution is stronger—much stronger—if what was done to the defendant was done away from the restraining influence of a public trial in an open courtroom The police and the prosecutors (and evidently the public) like it this way. They insist that they *need* it this way. Some people—perhaps a majority of the present Supreme Court—do not agree. This, in a word, is what the shouting is all about.

fundamentals [of police confession and the Constitution] directly and with a breadth of vision matched by few articles in the field.”³⁶

My article is divided into two sections. As Kamisar explained, *Escobedo* was a ruling that could be read broadly or narrowly. Kamisar spent several pages explaining how *Escobedo* should be read. Part I discusses Kamisar’s analysis of *Escobedo*. It also considers whether Kamisar accurately predicted how the Court would interpret *Escobedo* and how the Court would resolve the questions left open in *Escobedo*. Part II discusses whether the *Miranda* Court went far enough in the protections it afforded arrestees subjected to police interrogation. When *Miranda* was decided, the ruling was widely seen as defeat for law enforcement and a windfall for criminals. But this view of *Miranda* was not universal. Part II of my article considers two topics raised by Kamisar, but not addressed by the Court that would have made *Miranda* a more protective decision for arrestees—a requirement that interrogations be electronically recorded and a similar mandatory rule that an arrestee be given access to counsel before being allowed to waive his right to silence.

I. WHAT WOULD THE COURT DO IN THE CONFESSION CASES?

A. *The Scope and Impact of Massiah and Escobedo*

In 1964, when *Escobedo* was pending before the Court, an important shift in the Court’s thinking about police interrogation and confessions had occurred. Prior to the 1960s, the constitutional validity of confessions was primarily measured against the Due Process Clause of the Fourteenth Amendment. Under the due process standard, the Court would decide whether a suspect’s confession was “voluntary.” Until the mid-twentieth century, when a confession was found to be “involuntary,” and thus inadmissible at trial, it meant the Court believed the confession was unreliable.³⁷ Although the concept of “voluntariness” under the

Id.

³⁵ Professor Schulhofer best captures Kamisar’s writing style in a 1981 review essay of Kamisar’s book on confessions, which included a redacted version of the *Gatehouses and Mansions* article:

[The article] survey[s] the pros and cons [of police interrogation and the Constitution] but then let[s] you know where the author stands, usually in no uncertain terms, and often in language that glows white hot with an indignation made more compelling by Kamisar’s obvious awareness of countervailing arguments and his graciousness (usually) to the individuals who advance them.

Schulhofer, *supra* note 23, at 866.

³⁶ *Id.* at 865 n.2; cf. George C. Thomas III, *An Assault on the Temple of Miranda*, 85 J. CRIM. L. & CRIMINOLOGY 807, 816 (1995) (book review) (noting that Kamisar’s article “presents a legal argument to ban police interrogation that is, at once, simple, and profound”).

³⁷ See MODERN CRIMINAL PROCEDURE, *supra* note 22, at 440 (“At the outset . . . the primary (and perhaps the exclusive) basis for excluding confessions under the due process ‘voluntariness’ test was the ‘untrustworthiness’ rationale, the view that the confession rule was designed merely to

Due Process Clause expanded and evolved by the mid-point of the twentieth century,³⁸ the principal constitutional restraints on interrogation methods continued to come from the Court's due process cases.³⁹ A change in the Court's thinking, however, became evident in 1959. "Counting heads, it appeared that by 1959 a majority of the Court was of the view that, once a person was formally charged, his right to counsel had 'begun'—at least his right to the assistance of counsel he himself had retained. That is to say, the absence of counsel under such circumstances was alone sufficient to exclude any resulting confession."⁴⁰

The subsequent result in *Massiah* seemed to solidify the notion that the right to counsel (at least the right to *retain* counsel) provided an alternative basis for measuring the constitutionality of a confession obtained via police interrogation. As Kamisar explained:

[t]he crucial importance assigned to the absence of counsel [by the Court] may be viewed as part of a more general trend, a shift to the image of the accusatorial, adversary trial as the controlling standard of

protect the integrity of the fact-finding process."); Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1430 (1985) (noting that under the due process rule, "the Court defined voluntariness in a technical sense, at odds with common usage. In ordinary discourse, voluntariness suggests free will, choice, even spontaneity. In the typical interrogation, however, there is some coercion; the suspect is detained, queried, challenged, and contradicted. [Due process cases like *Chambers v. Florida*, 309 U.S. 227 (1940), and *Ashcraft v. Tennessee*, 322 U.S. 143 (1944),] employed the voluntariness concept as a shorthand for the conclusion that a confession had to be obtained under circumstances that made it trustworthy."); see also Kamisar, *supra* note 25, at 742–43 ("[W]hatever the current meaning of the elusive terms 'voluntary' and 'involuntary' confessions, originally the terminology was a substitute for the 'trustworthiness' or 'reliability' test. For most of the two hundred years within which this formulation had constituted 'the ultimate test,' it had been no more than an alternative statement of the rule that a confession was admissible so long as it was free of influences which made it 'unreliable' or 'probably untrue.'") (footnote omitted).

³⁸ See, e.g., *Spano v. New York*, 360 U.S. 315 (1959):

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the criminals themselves.

Id. at 320. Kamisar has described this evolution in another article: "As the voluntariness test developed over the years, and it became increasingly clear that the Court was applying a 'police methods' as well as a 'trustworthiness' rationale, the concern that an 'involuntary' or 'coerced' confession was likely to be unreliable became less important." *Remembering the "Old World"*, *supra* note 24, at 543.

³⁹ In federal prosecutions, the so-called *McNabb-Mallory* rule governed the admissibility of confessions obtained in violation of a federal statutory requirement that a suspect be promptly taken to a magistrate to determine whether there was probable cause to hold the suspect. See *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957). For a discussion of this rule, see MODERN CRIMINAL PROCEDURE, *supra* note 22, at 445–47.

⁴⁰ Kamisar, *supra* note 9, at 42–43.

the coerced confession cases. The novelty of this approach lay not in its articulation . . . but its application.⁴¹

In other words, the Court's concern that counsel was absent during police interrogation became the basis for reversing convictions, rather than merely existing as dicta to express the Court's disfavor toward questionable interrogation methods.

This was the context in which *Escobedo* was decided. Danny Escobedo was arrested for murder and brought to a police station for questioning. From one perspective, this was an atypical case. "Escobedo, a trouble-prone, scrawny little Chicago laborer, was a rare breed of criminal suspect—he was shrewd enough to have a lawyer on call when the police pulled him in for questioning, and simple enough to be tricked into confessing when his lawyer was not present to protect him."⁴² While being transported to the police station and during questioning, Escobedo frequently asked to speak with his lawyer, but those requests were denied. After Escobedo made an incriminating statement to the police, an assistant state's attorney spoke with him and "ask[ed] carefully framed questions apparently designed to assure the admissibility into evidence of the resulting answers."⁴³ At no time was Escobedo informed of his right to remain silent or given access to his counsel, despite his repeated requests to talk with his lawyer and his attorney's efforts to consult with his client.⁴⁴

After the Illinois courts ruled that Escobedo's confession was admissible at trial, the Court, in a split decision, ruled that the confession had been taken in violation of the Sixth Amendment right to counsel. In an opinion that has been aptly described as "accordion-like,"⁴⁵ *Escobedo* held that where:

[A police] investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied [his Sixth Amendment right to counsel] . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.⁴⁶

⁴¹ *Id.* at 46.

⁴² GRAHAM, *supra* note 4, at 164.

⁴³ *Escobedo*, 378 U.S. at 483.

⁴⁴ While Escobedo was in custody, his attorney arrived at the police station. The attorney repeatedly requested an opportunity to consult with his client, but those requests were denied. *Id.* at 480–81.

⁴⁵ *Remembering the "Old World"*, *supra* note 24, at 576 n.138.

⁴⁶ *Escobedo*, 378 U.S. at 490–91.

Escobedo was (and remains) a controversial and much debated ruling.⁴⁷ Although the *Miranda* opinion would soon “displace” the logic employed in *Escobedo*,⁴⁸ in 1964, the meaning, scope, and impact of *Escobedo* were uncertain. As Kamisar observed, in certain places Justice Goldberg’s opinion “meets the arguments for an ‘effective interrogation opportunity’ so directly, and rejects them so forcefully and fundamentally, that it promises (or threatens, depending upon your viewpoint) to extinguish *all* police interrogation as we know it.”⁴⁹ In other words, if *Escobedo* was read broadly, the Court was poised to deliver a knock-out blow to police interrogation methods.

On the other hand, certain factual aspects of *Escobedo* allowed some courts to read the ruling narrowly, permitting police interrogation methods to continue without change. For example, Kamisar noted that some issues addressed by state courts in the wake of *Escobedo*—for example, whether counsel was outside the interrogation room trying to get in, or whether counsel had instructed the police to cease questioning his client—should not have troubled judges.

How the rights conferred by *Escobedo* come into play and how they operate—whether the right to counsel turns on a request, whether the right is only available to the subject of police interrogation who has retained or can retain his own lawyer, whether the right to remain silent requires a warning to this effect—these are relatively easy questions.⁵⁰

In the immediate aftermath of *Escobedo*, however, many state courts were “muffing” the easy questions and not reaching the “hard questions” implicated by the ruling.⁵¹

What were the “hard questions” raised by *Escobedo*’s indeterminate holding? Kamisar identified those issues with precision and insight:

⁴⁷ See Caplan, *supra* note 37, at 1437 (asserting that *Escobedo* “marked a turning point in the law of confessions”); *id.* at 1443 (arguing that *Escobedo* “was a significant step toward barring ‘from evidence all admissions obtained from an individual suspected of crime, whether involuntarily made or not’”) (quoting *Escobedo*, 378 U.S. at 495 (White, J., dissenting)). Shortly after *Escobedo* was decided, the Court conceded that “th[e] case has been the subject of judicial interpretation and spirited legal debate,” “[b]oth state and federal courts, in assessing its implications, have arrived at varying conclusions,” “[a] wealth of scholarly material has been written tracing its ramifications and underpinnings,” and “[p]olice and prosecutors have speculated on its range and desirability.” *Miranda*, 384 U.S. at 440–41 (footnotes omitted).

⁴⁸ *Remembering the “Old World”*, *supra* note 24, at 577 (“*Miranda* did not build on the thinking in *Escobedo* as much as it displaced it. Although the *Miranda* Court moved in the same general direction as *Escobedo*, it chose a different path.”).

⁴⁹ Kamisar, *supra* note 9, at 53.

⁵⁰ *Id.* at 58.

⁵¹ *Id.*

[W]hen do the rights conferred by *Escobedo* first come into play, and, whenever they do (whomsoever they apply to), what is their scope and duration? Does the right to counsel begin only in potentially coercive situations? Only when conversation with a suspect shifts to “aggressive” questioning? Or as soon as a suspect is “arrested”? Or even earlier, when he is first “interviewed”? And whenever the right begins, of what does it consist? The right to consult with counsel during a brief break in the interrogation? The right not to be questioned until counsel arrives? The right never to be questioned again in the absence of counsel once he arrives?⁵²

Not only were these the “crucial questions” raised by *Escobedo*,⁵³ these were also the questions the *Miranda* Court would choose to resolve. But before the *Miranda* Court addressed them, Kamisar offered some interesting (and somewhat surprising) insights.

First, he noted that “[l]ogical radiations from *Massiah* and *Escobedo* carry far,” even to the point where “all police questioning in the absence of counsel is barred.”⁵⁴ Indeed, some of *Escobedo*’s language suggested that the Court was on the verge of reaching that conclusion, at least where *retained* counsel was not present.⁵⁵ Kamisar recognized, however, that extending *Massiah* and *Escobedo*

⁵² *Id.* at 58–59 (footnotes omitted).

⁵³ *Id.* at 59.

⁵⁴ *Id.* at 61. For example, the logic of *Massiah*—which relied upon the constitutional norm that a conviction could not stand if it rested in part on a confession that “had been deliberately elicited by the police after the defendant had been indicted, and therefore at a time when he was clearly entitled to a lawyer’s help” and which also recognized “that a Constitution which guarantees a defendant the aid of counsel at . . . trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding”, *Massiah*, 377 U.S. at 204—easily extended to police interrogation of an arrestee. As Kamisar observed:

Why does the “subject” of police interrogation who has not yet been indicted need “a lawyer’s help” any less than one who has been? If the failure to vouchsafe the aid of counsel to “an indicted defendant under interrogation by the police in a completely extrajudicial proceeding” “might deny [him] effective representation by counsel at the only stage when legal aid and advice would help him,” how or why is this less true of the unindicted prisoner?

Kamisar, *supra* note 9, at 44–45 (footnote omitted); *cf. Massiah*, 377 U.S. at 208 (White, J., dissenting) (the reasoning of the majority “would seem equally pertinent to statements obtained at any time after the right to counsel attaches, whether there has been an indictment or not.”).

Similarly, if *Escobedo* is read broadly, then the “right to counsel” that invalidated Danny Escobedo’s conviction “requires the continued presence and constant advice of counsel once he enters the picture, the right looms as a much more formidable, if not insurmountable, barrier to productive interrogation.” Kamisar, *supra* note 9, at 61.

⁵⁵ See, e.g., *Escobedo*, 378 U.S. at 488–89:

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the “confession” will, in the long

that far was unwarranted.⁵⁶ He agreed with “police-prosecution-minded critics of the Court” that if all interrogation was barred, then the critics could rightly claim that “the heavens were falling.”⁵⁷ Yet, while Kamisar recognized that *Massiah* and *Escobedo* should not (and would not) be pushed to their logical extremes, he also stated that arbitrary limits should not be imposed on the constitutional protections conferred by these rulings:

I do not deny that radiations from these cases must be modulated, perhaps, e.g., by applying them no earlier than the time of arrest or at the point when potentially coercive interrogation situations arise. I do deny that modulation should be achieved at the expense of the poor and the ignorant, e.g., by honoring rights only if asserted, but not effectively advising suspects of them; by heeding requests for the assistance of counsel only if the suspect can afford to hire a lawyer, but not providing any at state expense.⁵⁸

Second, Kamisar recognized that other constitutional norms besides the Sixth Amendment right to counsel were at stake in the debate about the impact and meaning of *Massiah* and *Escobedo*. Kamisar urged that, following its shift in focus from the Due Process Clause to the Sixth Amendment, the Court should again shift its focus and look to the Fifth Amendment’s privilege against compelled self-incrimination.⁵⁹ After all, when discussing the limits the Constitution imposes on police interrogation methods, “[q]uestions about the nature and scope of the right to counsel spill into questions about the nature and scope of the privilege against self-incrimination.”⁶⁰ For example, while *Escobedo* had been previously advised by his counsel that he should request to speak with his lawyer if arrested by the police, *Escobedo* was unprepared to deal with a false accusation of having been the trigger-man in a murder, and unaware of the legal significance that admitting to being present at the murder scene was just as damning as an admission of having fired the fatal shots. Put simply, it was defense counsel, and not the police, that was best positioned to inform the arrestee of his Fifth Amendment rights and the significance of talking to the police.

run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.

Id.; *Id.* at 490 (“If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.”).

⁵⁶ Kamisar, *supra* note 9, at 61.

⁵⁷ *Id.*

⁵⁸ *Id.* at 61–62.

⁵⁹ *Id.* at 62.

⁶⁰ *Id.* (footnote omitted). Kamisar observed that “Danny Escobedo only claimed a right to consult with counsel, not a right to his continued presence during police interrogation. But the Supreme Court opinion assigned more weight to the privilege against self-incrimination—and may have given it a more expansive reading, to boot—than did the *Escobedo* briefs.” *Id.* at 63.

Finally, Kamisar also recognized that equality norms, articulated in the Court's Equal Protection Clause cases, were latent in the constitutional debate concerning police interrogation and confessions.⁶¹ Here, Kamisar tackled one of the most difficult questions confronting the judiciary and law enforcement officials—who may invoke the protection afforded by *Escobedo*—but he made the tackle look easy:

More than legal symmetry is involved. Can it really be argued that the “gatehouse” assistance of assigned counsel—but not retained counsel—would “cripple” police efficiency? Are the “arguments from necessity”—and that is essentially the case for a police interrogation “opportunity”—to be overridden when, and only when, a suspect is sophisticated enough or hardened enough to assert his rights or rich enough to exercise them? . . .

The relevant question, however, is not whether the rights conferred by *Escobedo* can be confined to a “reasonable” class in the abstract, but whether such a class excludes persons similarly situated with respect to the policies and purposes of the decision

. . . .

. . . [H]ow can the lack of wealth or sophistication or experience be viewed as reasonable differentiations fairly related to the object of these recent decisions? . . . [H]ow can those ignorant of the privilege or the right to counsel be denied the benefits of th[e] policy resolution [reached in *Escobedo*]? . . . [H]ow does the situation become less delicate, less perilous; why does the need for legal guidance diminish, when the suspect is poor or ignorant? . . . [H]ow can those least aware of their constitutional rights “reasonably” be placed beyond the case’s bounds? . . . [H]ow can poverty, ignorance, stupidity, or friendlessness amount to exclusionary classifying traits? . . .

If “the mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color”—then the inability of a suspect to retain counsel cannot constitute sufficient grounds for limiting the impact of *Escobedo*, however “practical” or “reasonable” this might seem to some people. If “the right to be furnished counsel does not depend on a request” and, like other constitutional rights, must be “intelligently and understandingly

⁶¹ *Id.* at 68–69; see also *id.* at 93 (“In the wake of *Escobedo* . . . the ‘equality norm’ exerts pressure to provide all suspects with the rights a Danny Escobedo may enjoy at a time when there is much confusion over what these rights are and more controversy over what they ought to be.”).

waived,[""] then, again, inadequate formal education or insufficient native intelligence cannot be good enough reasons for failing to bring the right to counsel into play, however "fair" or "natural" this might seem to some people.⁶²

After making these observations about the proper way to read *Escobedo*, Kamisar approvingly and extensively quoted—because he could not "improve" on the language it contained⁶³—a government report written for Attorney General Robert Kennedy:

When government chooses to exercise its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice.⁶⁴

Wherever the Court was going with *Escobedo*, Kamisar predicted that it "will not get there this year or the next." Rather, "[t]he story of *Escobedo* and its progeny may take fifteen or forty years to tell, but the basic plot could well be the same."⁶⁵ While he believed that the final adjudication of the confession "problem" would take several years, Kamisar had no doubt about the correct interpretation of *Escobedo*, despite its "accordion-like" tone. The minimal meaning of *Escobedo* and the proper way to read that decision were clear: *all* arrestees are entitled to the constitutional protections conferred by *Escobedo*.⁶⁶

B. *Was Kamisar Right?*

Was Kamisar's analysis sound? Did he accurately predict what a post-*Escobedo* Court would do? Although Kamisar's sense of timing on "when" the Court would make a major move in the confession area was off, his legal analysis

⁶² *Id.* at 70–73 (footnotes omitted).

⁶³ *Id.* at 75.

⁶⁴ *Id.* at 75–76 (quoting REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 9 (1963)). As Kamisar explained years later, the Attorney General's Committee was chaired by Professor Francis A. Allen, and the report issued by the Committee became known as the "Allen Report." See Yale Kamisar, *Francis A. Allen: "Confront[ing] the Most Explosive Problems" and "Plumbing All Issues to Their Full Depth Without Fear or Prejudice"*, 85 MICH. L. REV. 406, 407 (1986). It is probably no coincidence that Chief Justice Warren cites the Allen Report in the same footnote wherein Kamisar's *Gatehouses and Mansions* article is cited. See *Miranda*, 384 U.S. at 472 n.41.

⁶⁵ Kamisar, *supra* note 9, at 91.

⁶⁶ *Id.* at 80–81.

was prescient and exact. Indeed, Kamisar's insight on the next steps the Court would take was near-perfect. Kamisar's reading of *Escobedo* was essentially the way the *Miranda* Court would read *Escobedo*.

As "every schoolboy" now knows,⁶⁷ *Miranda* ruled that an arrestee must be told of his right to remain silent and his right to have counsel present during any police interrogation. As the Court explained, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."⁶⁸

The Court's reliance on the Fifth Amendment came as a surprise to some. Prior to *Miranda*, the dominant view was that the Fifth Amendment did not control police interrogation methods.⁶⁹ Relying on *Massiah* and *Escobedo*, many of the lawyers representing the defendants in *Miranda* and its companion cases had understandably constructed their arguments around the Sixth Amendment right to counsel.⁷⁰

Chief Justice Warren's opinion in *Miranda*, however, demonstrated that the Court had once again shifted its constitutional focus, just as Kamisar urged. As the Court had done a few years earlier when it "shift[ed] to the image of the accusatorial, adversary trial as the controlling standard of the coerced confessions cases,"⁷¹ the *Miranda* Court again altered the constitutional focus for evaluating police interrogation methods. In his opening paragraph, the Chief Justice stated that the Fifth Amendment's Self-Incrimination Clause would decide the cases under review.⁷²

Although a shift to the Fifth Amendment may have been unanticipated in some quarters, Kamisar and others knew that the Fifth Amendment would affect the Court's future rulings on police interrogation and confessions, since "[q]uestions about the nature and scope of the right to counsel spill into questions

⁶⁷ Cf. *Dickerson*, 530 U.S. at 443 ("*Miranda* has become embedded in routine police practice to the point where warnings have become part of our national culture."); *Michigan v. Tucker*, 417 U.S. 433, 439 (1974) ("At this point in our history virtually every schoolboy is familiar with the concept, if not the language, [of the privilege against self-incrimination].").

⁶⁸ *Miranda*, 384 U.S. at 444.

⁶⁹ Kamisar, *supra* note 9, at 25–38.

⁷⁰ See, e.g., Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 118 n.45 (1998) (citing briefs filed in *Miranda* and its companion cases); John J. Flynn, *Panel Discussion on the Exclusionary Rule* 61 F.R.D. 259, 278 (1972) ("I was introduced for my accomplishments primarily as being of counsel in *Miranda*, and consistently I must disabuse everyone of the accomplishment When *certiorari* was granted [in *Miranda*] and we were asked by the ACLU to prepare and file the brief, we had a meeting in our law office in which we agreed that the briefs should be written with the entire focus on the Sixth Amendment [right to counsel] because that was where the Court was headed after *Escobedo*. . . ."), quoted in MODERN CRIMINAL PROCEDURE, *supra* note 22, at 462.

⁷¹ Kamisar, *supra* note 9, at 46.

⁷² *Miranda*, 384 U.S. at 439.

about the nature and scope of the privilege against self-incrimination.”⁷³ Kamisar also perceived that “the [*Escobedo*] opinion assigned more weight to the privilege against self-incrimination—and may have given it a more expansive reading, to boot—than did the *Escobedo* briefs.”⁷⁴ In retrospect, Kamisar and Chief Justice Warren appear to have been thinking along parallel lines. According to the Chief Justice, *Escobedo*’s attention to the fact that the police had not, at the outset of the interrogation, informed Escobedo of his right to remain silent “was no isolated factor, but an essential ingredient in our decision.”⁷⁵ The Chief Justice went on to state:

The entire thrust of police interrogation [in *Escobedo*], as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment. The abdication of the constitutional privilege—the choice on his part to speak to the police—was not made knowingly or competently because of the failure to apprise him of his rights; the compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant to speak.⁷⁶

The Court’s shift to the Fifth Amendment had practical and substantive consequences.⁷⁷ Under a Fifth Amendment regime, a suspect had a constitutional right to prevent police interrogation from ever occurring or to terminate questioning at anytime during the interrogation.⁷⁸ This principle was significant because:

Miranda eliminated, at least in principle, the due process test’s built-in conflict between the police officer’s duty to obtain a statement and his duty to respect the suspect’s constitutional rights: [T]he Court emphatically commanded the police to cease all questioning at the first sign of any desire to remain silent. The conflict, of course, persists below the surface because the officer will *want* to obtain a statement, but at least the Court tried to tell the police what, in theory, was expected of them.⁷⁹

⁷³ Kamisar, *supra* note 9, at 62.

⁷⁴ *Id.* at 63.

⁷⁵ *Miranda*, 384 U.S. at 465.

⁷⁶ *Id.*

⁷⁷ Cf. Schulhofer, *supra* note 23, at 878 (observing that the “crux of *Miranda* was not so much the now-famous warnings but rather the Court’s holding that” the Fifth Amendment would control the admissibility of confessions obtained during custodial interrogation).

⁷⁸ *Miranda*, 384 U.S. at 444–45.

⁷⁹ Schulhofer, *supra* note 23, at 879.

Additionally, Chief Justice Warren recognized that the facts in *Miranda* and its companion cases might not have amounted to constitutional violations under the “voluntariness” standard of the Due Process Clause.⁸⁰ None of the cases involved “overt physical coercion” or even the “patent psychological ploys” that had been recommended in various police interrogation manuals.⁸¹ Although such tactics might have mattered under a due process analysis, the absence of such evidence had no bearing when the right protected by the Fifth Amendment was under review: “[t]he fact remains that in none of the cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.”⁸²

By abandoning the due process model and shifting to a Fifth Amendment analysis, the Court was undertaking a deliberate effort to fortify the constitutional protections afforded suspects during custodial interrogation.⁸³ When considering admissibility of a confession under the Due Process Clause, judges were to assess the totality of the circumstances. A totality analysis requires at least two steps. First, the judge must assess all the facts and circumstances surrounding the confession. Second, a judge must weigh or “balance” the government’s interest in obtaining confessions and the suspect’s interest in not being coerced. By shifting to a Fifth Amendment regime, the Court was signaling that the latter type of “balancing” was no longer appropriate:

⁸⁰ *Miranda*, 384 U.S. at 457 (“In these cases, we might not find the defendants’ statements to have been involuntary in traditional terms.”).

⁸¹ *Id.*

⁸² *Id.*

⁸³ See JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 120 (1993). Grano explained that the shift to the Fifth Amendment was “significant from a jurisprudential standpoint”:

By thus leaving the due process “totality of circumstances” approach behind, the Court enabled itself to fashion a detailed code of interrogation rules that due process jurisprudence could never have supported. Moreover, by shifting constitutional gears from Fourteenth Amendment due process to Fifth Amendment self-incrimination, the Court avoided the need formally to overrule decades of due process precedent that had rejected litmus tests for the admissibility of confessions.

Id. The shift to a Fifth Amendment theory was important for another reason. Prior to *Miranda*, very few confessions were “coerced” or “compelled” from a defendant, if coercion or compulsion were given a literal reading. Put another way, when the Court ruled that a confession was “voluntary” or “involuntary” under the Due Process Clause of the Fourteenth Amendment, the term “voluntariness” was “being employed as a term of art, not in its ordinary dictionary sense.” Kamisar, *supra* note 25, at 746. The difference between what the Due Process Clause barred and what the Fifth Amendment barred was highlighted during the oral argument in *Vignera v. New York*, one of the companion cases to *Miranda*. Counsel for the defendant was asked by Justice Harlan whether he was claiming that his client’s confession was coerced. Counsel responded: “In no sense. I don’t think it was coerced at all.” MODERN CRIMINAL PROCEDURE, *supra* note 22, at 460–61. Counsel then explained that:

[i]t is true that the word “compel” is used in the Fifth Amendment with respect to the privilege, but it is quite different to say that the privilege is cut down and impaired by detention and to say a man’s will has been so overborne a confession is forced from him.

Id.

A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged.⁸⁴

Second, Kamisar also correctly recognized that rulings under the Equal Protection Clause would influence the Court's analysis in the confession cases. One of the questions left unresolved in *Escobedo* was who may invoke the right to counsel—only the suspect with retained counsel, or both the suspect with retained counsel and the suspect too poor or ignorant to hire a lawyer. For Kamisar, the answer was easy. “[T]he inability of a suspect to retain counsel cannot constitute sufficient grounds for limiting the impact of *Escobedo*, however ‘practical’ or ‘reasonable’ this might seem to some.”⁸⁵ Put simply, “the ‘equality norm’ exerts pressure to provide all suspects with the rights a Danny Escobedo may enjoy.”⁸⁶

One year later, the *Miranda* Court would agree. Indeed, the pressure exerted by the equality norm on police interrogations, which Kamisar had brilliantly described,⁸⁷ became a centerpiece of the constitutional structure built by

⁸⁴ *Miranda*, 384 U.S. at 479 (citation omitted); see also Schulhofer, *supra* note 23:

[T]he reliance on the Fifth Amendment implied that the need for effective ways of obtaining statements and the need to avoid overreaching the suspect could no longer be seen as equally important concerns. Instead, by viewing the problem in Fifth Amendment terms, the Court made clear (at least in principle) that protection against compulsory self-incrimination was not to be balanced against other legitimate social interests.

Id. at 878 n.61; cf. Steven J. Schulhofer, *Miranda*, Dickerson and the Puzzling Persistence of Fifth Amendment Exceptionalism, 99 MICH. L. REV. 941, (2001):

Miranda had brought Fifth Amendment standards into the stationhouse under the expressly stated assumption that those standards provided more protection than the traditional Fourteenth Amendment voluntariness requirement. Fifth Amendment requirements do “sweep more broadly” than those of the Fourteenth, and it was precisely for that reason that incorporation was, in its day, so controversial.

Id. at 950. Although *Miranda* chose to rely on the Fifth Amendment rather than the Due Process Clause, the “due process” model remains the primary test for judging the admissibility of many incriminating statements obtained after a suspect has waived his *Miranda* rights or where *Miranda*'s protection does not apply. See Schulhofer, *supra* note 23, at 877; Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2009 (1998) (arguing that “while police interrogators [currently] have in some respects been afforded greater freedom than they were during the era immediately preceding *Miranda*, the nature of the voluntariness test has not fundamentally changed”).

⁸⁵ Kamisar, *supra* note 9, at 73.

⁸⁶ *Id.* at 93.

⁸⁷ Chief Justice Warren acknowledged Kamisar's contribution and influence on this point. See *Miranda*, 384 U.S. at 472 n.41 (citing Kamisar, *supra* note 9, at 64–81).

Miranda.⁸⁸ After explaining that every arrestee subject to interrogation must be informed of his right to remain silent, the negative consequences of speaking to the police, and his right to consult with counsel prior to and during questioning,⁸⁹ Chief Justice Warren made it clear that the rights conferred in *Escobedo* would not be limited to the rich or sophisticated suspect or to the person lucky enough to have retained counsel before arriving at the police station:

If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decision today would be of little significance. The cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel. While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice. Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in *Gideon v. Wainwright* and *Douglas v. California*.⁹⁰

Leaving no doubt that the Court would not tolerate arbitrary distinctions among suspects, the Chief Justice also instructed police officials to provide an additional warning that would make the privilege meaningful to the vast majority of suspects questioned by the police:

⁸⁸ See, e.g., Caplan, *supra* note 37, at 1469 ("The Court viewed as unfair a suspect's inadequacies in confronting his interrogators on an equal basis or in possessing the same fortitude as other suspects. The Court wanted to place all of the participants on equal ground."); *id.* at 1470 ("*Miranda* stood out like a crown jewel. It spoke to the disadvantaged and the discontented."). Caplan argues, however, that this aspect of *Miranda* is a major flaw of the decision:

[G]uilt is personal To hold otherwise is to confuse justice with equality Since sophisticated suspects ordinarily will choose not to confess (with or without knowledge of their rights), "[t]o strive for equality . . . is to strive to eliminate confessions." Thus, the *Miranda* Court elected to let one person get away with murder because of the advantage possessed by another.

Id. at 1457 (footnotes omitted).

⁸⁹ *Miranda*, 384 U.S. at 465–71.

⁹⁰ *Id.* at 472 (footnotes and citations omitted).

In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.⁹¹

In retrospect, Kamisar's analysis of *Escobedo* was amazingly accurate. After *Escobedo* was handed down, many people had worried (or hoped) that the ruling portended that the Court would soon bar all police interrogation. As Kamisar intuitively knew, such a momentous event was highly unlikely, even though aspects of *Escobedo* and *Massiah* suggested that the Court was taking an increasingly hostile view of police interrogation. Furthermore, Kamisar also realized—based on his interpretation of *Escobedo* and the Court's equal protection jurisprudence—that the Court would look to constitutional provisions other than the Sixth Amendment right to counsel and the Due Process Clause of the Fourteenth Amendment to resolve the crucial questions raised by *Escobedo*. As Kamisar predicted, the Fifth Amendment's Self-Incrimination Clause directly, and the Equal Protection Clause indirectly, affected the Court's thinking concerning "who" was entitled to assert the rights conferred by *Escobedo* and *Massiah*. Ultimately, the Court reached the same conclusion that Kamisar and others had urged: *all* arrestees—not just the suspect with retained counsel or rich enough to hire a lawyer, or even the accused sophisticated enough to request a lawyer, but the poor and ignorant suspect as well—were constitutionally entitled to claim the protection afforded by the privilege against self-incrimination during custodial interrogation.

II. DID THE *MIRANDA* COURT GO FAR ENOUGH?

Among the public at large, the response to *Miranda* was immediate and shocking. Predictably, the police reacted most vehemently. To say that the Court's scrutiny of routine interrogation practices "did not sit well with the law

⁹¹ *Id.* at 473 (footnotes omitted).

enforcement community”⁹² is an understatement. Indeed, “police looked at *Miranda* and felt a ‘slap at policemen everywhere . . . a personal rebuke.’”⁹³

Ironically, the initial venom that was directed at *Miranda* and the Warren Court was misplaced and ill-informed. Although the public may not have recognized the nature and scope of *Miranda* in 1966, Kamisar and others knew that *Miranda* was a compromise ruling.⁹⁴ From a civil liberties perspective, *Miranda* had several obvious flaws, one of which was the failure to require that interrogation sessions be recorded in their entirety.

A. *Why Not Tape Interrogations?*

Prior to *Escobedo* and *Miranda*, many police officials (and their defenders) resisted the assertion that suspects assumed that the police had a legal right to demand answers to questions during custodial interrogation, and rejected the charge that, during interrogation sessions, police officers convey the message that interrogators have unlimited time to obtain the answers they are seeking and

⁹² LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 176 (1983).

⁹³ *Id.* at 177.

⁹⁴ Yale Kamisar, *Kauper’s “Judicial Examination of the Accused” Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15 (1975):

[A]lthough one would gain little inkling of it from the hue and cry that greeted that much-maligned case . . . *Miranda* marked a ‘compromise’ between the old ‘voluntariness’ test (and the objectionable police interrogation tactics it permitted in fact) and the extreme proposals that—as the fear (or hope) was expressed at the time—would have ‘killed’ confessions.

Id. at 30. Many scholars and judges have recognized that *Miranda* was a “compromise” decision. See, e.g., Marvin E. Frankel, *From Private Fights Toward Public Justice*, 51 N.Y.U. L. REV. 516, 526 (1976) (“Nobody, ‘liberal’ or ‘conservative,’ is happy with *Miranda v. Arizona*. Nobody should be. It is at best a tense, temporary, ragged truce between combatants.”); Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 736 (1987); *Remembering the “Old World”*, *supra* note 24, at 578–80; Susan R. Klein, *Miranda Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV. 417, 424 (1994); Schulhofer, *supra* note 23, at 879–84 (insightful discussion on the benefits and failures of *Miranda* to protect Fifth Amendment rights); Weisselberg, *supra* note 70, at 121; cf. DONALD A. DRIPPS, *ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE* 57 (2003) (“[A]s a matter of Sixth Amendment law, *Miranda* marked a major victory for the government. Police interrogation was saved from the jaws of *Escobedo*.”). Although he is extremely skeptical about the merits of the Court’s decision in *Miranda*, Professor H. Richard Uviller also acknowledges that *Miranda* neither favors the police nor arrestees. See H. RICHARD UVILLER, *TEMPERED ZEAL* 196 (1988):

[T]he resolution of the *Miranda* case seriously impugns the integrity of its premises: if a confession given in police custody is necessarily coerced, so is a waiver [I]f noncoercive custodial interrogation is to be permitted (as it is), the famous warning adds little to the suspect’s protection. Those suspects actually intimidated by the circumstances of custody are hardly reassured by hearing the ritual incantation from their inquisitors.

Id.

various methods, legal as well as extralegal, for securing those answers. If the critics of *Escobedo* were correct about these matters, Kamisar wondered:

[W]hy are the police so bent on preventing counsel from telling them what they already know? Why, at least, don't the officers themselves tell their "subjects" plainly and emphatically that they need not and cannot be made to answer? That they will be permitted to consult with counsel or be brought before a magistrate in short order? And why is the "subject" questioned in *secret*?⁹⁵

Kamisar recognized, one year before *Miranda*, that whatever the scope of the rights conferred by *Escobedo*, those rights would amount to very little unless interrogations were recorded. "In the long run, no statute, court rule, or court decision pertaining to warnings or waivers will suffice—for the same reason that the flood of appellate opinions on 'involuntary' confessions have not sufficed—until police interrogation is stripped of its 'most unique feature . . . its characteristic secrecy.'"⁹⁶

Indeed, Kamisar further asserted that unless recording of interrogations was mandatory, police officers would be able to "shrug off" any constitutional rule imposed by the Court knowing that enforcement of that any such rule would depend on their testimony.⁹⁷ If recording was not required, Kamisar opined that a suspect's access to a lawyer was imperative.⁹⁸

Chief Justice Warren's opinion in *Miranda* recognized the problem of secrecy, but from a different perspective. He noted that the "difficulty in depicting what transpires at . . . interrogations stems from the fact that in this country they have largely taken place incommunicado."⁹⁹ And because police officials are responsible for establishing and maintaining the secrecy surrounding interrogations, the Chief Justice imposed a "heavy burden" on the state to prove that a suspect had knowingly and voluntarily waived his Fifth Amendment rights.¹⁰⁰ Yet, the Chief Justice did not follow the advice of Kamisar and others, despite their compelling constitutional and practical arguments in support of mandatory recording. Under the framework established in *Miranda*, where

⁹⁵ Kamisar, *supra* note 9, at 32.

⁹⁶ *Id.* at 85–86 (quoting Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, in *POLICE POWER AND INDIVIDUAL FREEDOM* at 179 (Claude R. Sowle ed., 1962)).

⁹⁷ *Id.* at 87 (footnote omitted).

⁹⁸ *Id.*

⁹⁹ 384 U.S. at 445; *id.* at 448 ("Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.").

¹⁰⁰ *Id.* at 475.

constitutional rights turn on what the police say (or don't say) and the responses of the arrestee, recording would seem to be a constitutional necessity.¹⁰¹

Why didn't *Miranda* require recording? Although Chief Justice Warren's opinion acknowledges the problem of secrecy and the responsibility of the state "for establishing the isolated circumstances under which the interrogation takes place,"¹⁰² it does not mention, let alone require, recording as a tool for capturing what transpires during interrogation or for reducing some of the abuses of custodial interrogation. Perhaps the *Miranda* majority felt that a recording requirement would exacerbate charges that the Court was "legislating from the bench" with no constitutional text to support the requirement.¹⁰³ A judicially imposed recording requirement might have been perceived as enhancing the "rigidity" of the opinion.¹⁰⁴ Or, the Court might have assumed that virtually every suspect, after receiving the "warnings," would instinctively request counsel, thereby negating the need for recording because "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."¹⁰⁵

Whatever the reason, the Court missed and continues to ignore a significant opportunity to protect the Fifth Amendment's privilege. In 1965, Kamisar knew that recording was essential if judges were serious about restricting police abuse during interrogation. More than a decade later, Kamisar, again, convincingly argued that recording of interrogations "should dominate our thinking about the confession problem".¹⁰⁶

¹⁰¹ Bernard Weisberg has succinctly stated this point better than anyone else:

It is secrecy, not privacy, which accounts for the absence of a reliable record of interrogation proceedings in a police station. If the need for some pre-judicial questioning is assumed, privacy may be defended on grounds of necessity; secrecy cannot be defended on this or any other ground.

Weisberg, *supra* note 96, at 155; *see also* Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 317–21 (2003) (outlining constitutional arguments for a recording requirement). While most criminal procedure scholars favor an electronic recording requirement, this view has not been unanimous. *See* Paul G. Cassell, *Miranda's Social Costs: An Empirical Assessment*, 90 NW. U. L. REV. 387, 486–97 (1996) (proposing videotaping of confessions as an alternative to the provision of *Miranda* warnings).

¹⁰² *Miranda*, 384 U.S. at 475.

¹⁰³ *See* Yale Kamisar, *Killing Miranda In Baltimore: Reflections on David Simon's Homicide*, Jurist: Books-on-Law, Feb. 1999, vol. 2, no. 2 (book review), available at <http://jurist.law.pitt.edu/lawbooks/revfeb99.htm> (observing that the *Miranda* Court might have "feared that requiring electronic recording of police questioning, whenever feasible, would have added fuel to the criticism that it was 'legislating'").

¹⁰⁴ *Cf.* BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 590 (1983) (describing Justice Brennan's fear, voiced after reading a draft of the Chief Justice's opinion, that the *Miranda* opinion "was too rigid because it failed to leave room for legislatures to devise alternative procedures for safeguarding the Fifth Amendment privilege").

¹⁰⁵ *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., dissenting).

¹⁰⁶ *A Hard Look*, *supra* note 22, at 243; *id.* at 237–43 (providing arguments supporting a recording requirement).

Otherwise, decades of experience will surely have been wasted. Otherwise, it will be of no great moment whether new stories are added to the temples of constitutional law or old ones removed. For any time an officer unimpeded by any objective record distorts, misinterprets, or overlooks one or more critical events, the temple may fall. For it will be a house built upon sand.¹⁰⁷

Regrettably, thirty-four years after *Kamisar* initially pressed the point, little has changed. Despite the virtually unanimous view of criminal procedure scholars, and supporters and critics of *Miranda* alike, that interrogations should be recorded, electronic recording of interrogations remains the rare exception in the nation's police stations.¹⁰⁸ By 1999, *Kamisar* was using even stronger language to reiterate what he had proposed on the eve of *Miranda*:

The only startling thing about [mandatory recording] is that, after all these years, American law enforcement officials are still able to prevent objective recordation of all the facts of police "interviews" or "conversations" with a suspect and, of course, how the warnings are delivered and how the waiver of rights is obtained Unless tape-recording of police interrogations is required, it will be of no great moment whether *Miranda* is expanded or cut down or reshaped. For absent such a requirement, sweet-talking police interrogators will be able to assail, maim, and all but kill *Miranda* (or, for that matter, any other confession rule).¹⁰⁹

The failure to require recording of interrogations is a major flaw of *Miranda*. Without an objective recording of what occurred during an interrogation session, trial judges are forced to resolve the "swearing contest" between the arrestee who insists that his rights were violated and the police who claim that they scrupulously respected the arrestee's rights.¹¹⁰ It is no surprise that trial judges typically rule in favor of the police because, as Walter Schaefer acknowledged ten years before *Miranda* was decided:

¹⁰⁷ *Id.* at 243.

¹⁰⁸ See Slobogin, *supra* note 101, at 314. Illinois recently enacted legislation mandating recording of interrogation of homicide suspects *only*. Monica Davey, *Illinois Will Require Taping of Homicide Interrogations*, N.Y. TIMES, July 17, 2003, at A12.

¹⁰⁹ *Kamisar*, *supra* note 103.

¹¹⁰ See William J. Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975, 976 n.8 (2001) (noting that *Miranda* "did nothing to ensure an objective record of the interrogation, leaving suppression hearings in the same situation—swearing matches between suspects and police officers—they were in before *Miranda* was decided.").

[i]n the field of criminal procedure . . . a strong local interest competes only against an ideal. Local interest is concerned with the particular case and with the guilt or innocence of the particular individual The counterbalance is only a general ideal of fair procedure which, if it is to prevail, must transcend the circumstances of the particular case.¹¹¹

And because appellate judges tend to defer to the factual findings of trial judges, the judiciary inevitably credits the “police” version of what was said or done during an interrogation session. Police officers are surely aware of this reality.¹¹² Thus, without an objective record of the interrogation sessions, the constitutional protections afforded by *Miranda* are left to the discretion and good faith of police officers.

B. *Access to Lawyers, the Fifth Amendment, and Kamisar*

Another major defect (or one of the few virtues, depending on your perspective) of *Miranda* was the failure to require that a suspect be given access to counsel. From the perspective of the typical suspect—the poor, ignorant or minority arrestee—access to counsel was essential to make the Fifth Amendment’s privilege meaningful. After all:

[I]t is a prime function of police custodial incommunicado interrogation to tear a subject away from all things on which he can rely for support and place him in complete subservience to the interrogator. The aim is to have him dominated by the interrogator. In order to dispel such circumstances, therefore, it is manifestly necessary that the incommunicado environment be eliminated. The presence of counsel will tend to accomplish this aim.¹¹³

If the Fifth Amendment is to have real meaning in the interrogation context, then the “aim” of the Court must be “to assure that the individual’s right to choose

¹¹¹ Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 5 (1956). When he wrote this article, Schaefer was a Justice on the Illinois Supreme Court. Tellingly, Justice Schaefer acknowledged the difficulty he experiences when deciding constitutional issues. “I can testify that it is not always easy to focus upon the [constitutional] procedural requirement and shut out considerations of guilt or innocence.” *Id.* at 13.

¹¹² *Cf. Miranda*, 384 U.S. at 505 (Harlan, J., dissenting) (“Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers.”); see also Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 350 (1974) (“I am convinced that the major force shaping the evolution of Supreme Court confession cases from *Brown v. Mississippi* through *Haynes* and *Escobedo* to *Miranda* was distrust of the fact-finding propensities of state trial judges.”).

¹¹³ Brief of American Civil Liberties Union as *Amicus Curiae* at 23, *Miranda v. Arizona*, 384 U.S. 436 (1966) [hereinafter Brief of ACLU].

between silence and speech remains unfettered throughout the interrogation process.”¹¹⁴ When approached from this perspective, “the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege”¹¹⁵

Although the argument supporting mandatory access to counsel made good sense from a Fifth Amendment perspective, the Court’s pre-*Miranda* doctrine, as Kamisar cogently explained, had created much confusion regarding the scope and duration of the right to counsel for arrestees. From one viewpoint, the right to counsel recognized in *Escobedo* could be seen as a narrow protection for arrestees because “Danny Escobedo only claimed a right to consult with counsel, not a right to his continued presence during police interrogation.”¹¹⁶

A broader view of the right conferred in *Escobedo*, however, was also possible. The result in *Massiah*, another right to counsel case, “seem[ed] to prohibit *any* interrogation of a person without his lawyer’s consent or presence once he is formally charged.”¹¹⁷ As the dissenters in *Massiah* pointed out, “the reason given for the result here—the admissions were obtained in the absence of counsel—would seem equally pertinent to statements obtained at any time after the right to counsel attaches, whether there has been an indictment or not.”¹¹⁸ Indeed, many feared that *Escobedo* seemed to embrace the very point made by the *Massiah* dissenters when Justice Goldberg wrote “no meaningful distinction [regarding the right to counsel] can be drawn between interrogation of an accused before and after formal indictment.”¹¹⁹ In sum, “if the ‘right to counsel’ requires the continued presence and constant advice of counsel once he enters the picture, the right looms as a much more formidable, if not insurmountable, barrier to productive interrogation.”¹²⁰ Put another way, access to counsel will make an arrestee’s Fifth Amendment privilege meaningful.

In *Miranda* and its companion cases, the issue of mandatory access to counsel was clearly on the minds of some of the Justices.¹²¹ Indeed, the amicus brief filed by the American Civil Liberties Union argued that the *presence* of counsel during interrogation was required under the Fifth Amendment.¹²² Ultimately, however,

¹¹⁴ *Miranda*, 384 U.S. at 469.

¹¹⁵ *Id.*

¹¹⁶ Kamisar, *supra* note 9, at 63.

¹¹⁷ *Id.* at 64.

¹¹⁸ *Id.* (quoting *Massiah*, 377 U.S. at 206 (White, J., dissenting)).

¹¹⁹ *Escobedo*, 378 U.S. at 486.

¹²⁰ Kamisar, *supra* note 9, at 61.

¹²¹ See Kamisar, *supra* note 8, at 68 n.47.

¹²² Brief of ACLU, *supra* note 113, at 3 (“A police warning of the subject’s right to remain silent is not adequate. Neither is the granting of prior access to counsel, as distinguished from the presence of counsel.”); *id.* at 23:

[T]here is a need to provide the presence of someone at interrogation in whom the subject can confide and who will bolster his confidence The aim of [interrogation] is to

Chief Justice Warren's opinion bypassed the issue of whether the Fifth Amendment required that all arrestees have access to counsel. As Professor Stephen Schulhofer has noted, the Court "could have done much better by insisting on the presence of an attorney during interrogation, or by requiring initial consultation with an attorney or friend, or even by mandating that warnings and waivers take place in the presence of a neutral magistrate who could break the wall of isolation and hostility surrounding the suspect."¹²³ Interestingly, in several places, Chief Justice Warren's opinion acknowledged the merits of the ACLU position,¹²⁴ but he failed to directly address the ACLU argument.¹²⁵

Kamisar's own views on this subject in *Gatehouses and Mansions* are not entirely clear, which is very un-Kamisaresque. On the one hand, Kamisar states

have [the subject] dominated by the interrogator. In order to dispel such circumstances, therefore, it is manifestly necessary that the incommunicado environment be eliminated. The presence of counsel will tend to accomplish this aim.

Id.

¹²³ Schulhofer, *supra* note 23, at 881 (footnotes omitted).

¹²⁴ For example, after discussing *Escobedo* and the fact that Escobedo's request for counsel was denied, the Court observed:

The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.

Miranda, 384 U.S. at 466. Later, the Court noted that:

[E]ven preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

Id. at 470.

¹²⁵ One passage in *Miranda* suggested a summary rejection of the ACLU position. That section stated: "This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners." 384 U.S. at 474. Shortly after *Miranda* was decided, Kamisar took the view that *Miranda* had not directly addressed the ACLU position. See Kamisar, *supra* note 8, at 68 n.47 ("The failure of the Court to deal explicitly with (if only to reject) the ACLU contention is surprising . . ."). As the years have passed, Kamisar's thinking on this point appears to have evolved. In 1990, he wrote: "Although the [*Miranda*] Court must have considered [the ACLU] contention—it was heavily influenced by other portions of the ACLU brief—it rejected it without any explicit discussion." *Remembering the "Old World"*, *supra* note 24, at 583 n.158. For what is it worth, the Rehnquist Court seems to agree with Kamisar's updated view that *Miranda* did reject the ACLU position. See *Moran v. Burbine*, 475 U.S. 412 (1986):

Declining to adopt the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation, see Brief for American Civil Liberties Union as *Amicus Curiae* . . . , the [*Miranda*] Court found that the suspect's Fifth Amendment rights could be adequately protected by less intrusive means.

Id. at 426.

that he “would not abolish all in-custody police interrogation,” and he recognizes that the state does not have “an obligation to prevent a suspect from incriminating himself.”¹²⁶ Moreover, he disagrees that the logic of *Massiah* and *Escobedo* impelled that “all police interrogation in the absence of counsel is barred.”¹²⁷ Indeed, Kamisar never rejects the conventional wisdom that if counsel is brought to the stationhouse, all interrogation will cease because “any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.”¹²⁸

On the other hand, there are times when Kamisar’s analysis supports mandatory access to counsel. For example, after recognizing that it is unrealistic to expect police to dutifully notify a suspect of the very rights that can then be used to frustrate an interrogation,¹²⁹ Kamisar observed:

Suspects there are who feel in a “pleading guilty” mood, for some of the many reasons most defendants do plead guilty. Suspects there are who would intentionally relinquish their rights for some hoped-for favor from the state. I do not deny this. *I do deny that such suspects do not need a lawyer.*

Surely the man who, in effect, is pleading guilty in the gatehouse needs a lawyer no less than one who arrives at the same decision only after surviving the perilous journey through that structure.¹³⁰

Similarly, Kamisar acknowledges the complaint that the presence of counsel in the police station may result in the suppression of truth, “just as the presence of counsel at the trial may, when a client is advised not to take the stand, or when an objection is made to the admissibility of trustworthy, but illegally seized, ‘real evidence.’”¹³¹ But Kamisar wonders why this matters under the Fifth Amendment:

If the subject of police interrogation not only cannot be “coerced” into making a statement, but need not volunteer one, why shouldn’t he be so advised? And why shouldn’t court-appointed counsel, as well as retained counsel, so advise him? . . .

Is there any doubt that the State must *provide* counsel so that an indigent may exclude the illegally seized, but trustworthy, physical evidence—

¹²⁶ Kamisar, *supra* note 9, at 10.

¹²⁷ *Id.* at 61.

¹²⁸ *Watts*, 338 U.S. at 59 (Jackson, J., dissenting).

¹²⁹ Kamisar, *supra* note 9, at 35–36.

¹³⁰ *Id.* at 36 (emphasis added).

¹³¹ *Id.* at 78.

may suppress the truth, if you will? Is there any doubt that the failure of assigned counsel to exclude such probative evidence may amount to denial of an indigent's constitutional right to effective assistance of counsel? To this extent are we not affording the poor an equal opportunity to avoid a "just conviction"? Why shouldn't the same be done in the case of the privilege against self-incrimination?¹³²

Finally, if the Court is unwilling to require that interrogations be electronically recorded, Kamisar observes that the need for counsel's presence at the stationhouse is even more compelling:

How can we indefinitely postpone the electronic preservation of speech in circumstances where—not just from the point when the subject is ready to confess, but from the very start of the proceedings to the finish—who said *exactly what, precisely how*, is so important? Until that day comes, the case for the continued presence (if not the constant advice) of counsel will grow ever stronger. Until that day comes, too many police interrogators will be able to shrug off the new right-to-counsel confession cases as they have the old, with the comforting thought that "after all prohibition is better than no liquor at all."¹³³

Chief Justice Warren refused to impose a rule mandating access to counsel because *Miranda* was a "compromise" decision. If the Court was unwilling to impose the less burdensome requirement of mandatory recording of interrogation sessions, mandatory access to a lawyer before interrogation was a chimera. But why was Kamisar unwilling to advocate a rule requiring mandatory access to counsel *before* interrogation of any arrestee? And why has Kamisar been noticeably mild in his criticism of *Miranda* on this issue?¹³⁴ For example, shortly after *Miranda* was decided Kamisar noted that "[t]he *Miranda* Court required enough things 'at one gulp,' for me at any rate, but a rule that a suspect needs counsel to waive counsel is by no means unthinkable."¹³⁵

¹³² *Id.* at 78–79 (footnote omitted).

¹³³ *Id.* at 87–88 (footnotes omitted).

¹³⁴ Cf. Schulhofer, *supra* note 23, at 882 ("Kamisar probably would be the last person to deny [*Miranda*'s] shortcomings. Yet his [first post-*Miranda* article] seems astonishingly circumspect about these matters.").

¹³⁵ Kamisar, *supra* note 8, at 68 n.47. A decade later, Kamisar observed:

Miranda has weaknesses. The principal cluster of its weaknesses (from the suspect's perspective, at any rate) is that it permits the police to obtain waivers of constitutional rights without the advice or presence of counsel, without the advice or presence of a judicial officer, and without any objective recording of the proceedings. But these weaknesses . . . are not irremediable.

When Does it Matter?, *supra* note 22, at 100.

Kamisar's muted criticisms of *Miranda* are not surprising. Kamisar's scholarship is the rare combination of compelling and persuasive legal analysis with the proper amount of realpolitik. I suspect that *Gatehouses and Mansions* did not urge a mandatory access to counsel rule because Kamisar knew that such a rule was unobtainable, notwithstanding the forceful legal arguments favoring such a rule—many of which Kamisar himself had formulated and articulated.¹³⁶ Put simply, Kamisar realized that the Court would only go so far in *Miranda*. Years later, Kamisar made the point more directly:

[L]iberal critics of *Miranda* do not seem to realize that if, for example, [the Court had required that a suspect meet with and obtain the advice of counsel before effectively waiving his rights, or] the Court had explicitly required the police to make a tape recording, or even a verbatim stenographic record, of the crucial events, it would have received a great deal more criticism than it actually did (and it received quite a bit) for acting not as a court but as a legislature.

Moreover, and more generally, the liberal critics of *Miranda* do not seem to realize that in 1966 it was probably not possible to persuade a majority of the Court to go one inch further than it did.¹³⁷

III. CONCLUSION

Miranda is no longer considered the “monster” that police officials and political conservatives claimed it was in 1966. “Most professional law enforcement organizations ha[ve] learned to live with *Miranda*, and even to love it, to the extent that it provide[s] them with a safe harbor.”¹³⁸ Indeed, there are good reasons to believe that the *Miranda* “warnings work to liberate the police” and that

¹³⁶ After *Miranda* was decided, Kamisar generously noted “in all . . . respects the ACLU amicus brief presents ‘a conceptual, legal and structural formulation that is practically identical to the majority opinion—even as to use of language in various passages of the opinion.’” Kamisar, *supra* note 8, at 68 n.47 (citation omitted). Modestly, and understandably, Kamisar did not say that the ACLU brief relies heavily on the legal analysis and arguments presented in his *Gatehouses and Mansions* article.

¹³⁷ Yale Kamisar, *Miranda Does Not Look So Awesome Now*, LEGAL TIMES, June 10, 1996, at 22.

¹³⁸ CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 45 (1991); cf. *Moran v. Burbine*, 475 U.S. 412, 423 (1986) (noting that *Miranda* “strikes the proper balance between society’s legitimate law enforcement interests and the protection of the defendant’s Fifth Amendment rights”). In his new and insightful book, Professor Dripps attributes *Miranda*’s survival and “promising life expectancy,” in part, to another of Kamisar’s articles. Dripps notes that Kamisar’s *The Miranda Dissents*, see *supra* note 8, thoroughly destroyed the doctrinal arguments of those who advocated that the voluntariness test of the Due Process Clause was better suited to resolve the constitutional issues surrounding police interrogation and confessions. DRIPPS, *supra* note 94, at 83–84.

“*Miranda*’s warnings unquestionably serve—and from the outset were designed to serve—the function of permitting custodial interrogation to continue.”¹³⁹ *Miranda* is no longer a “monster” in the eyes of the police (and the modern Supreme Court) because *Miranda* is no longer what it was. Although *Dickerson v. United States*¹⁴⁰ purported to reaffirm *Miranda*’s constitutional status, what *Dickerson* actually reaffirmed “was not the robust *Miranda* that burst on the scene in 1966, but the *Miranda* that was bloodied and bruised by the Burger and Rehnquist Courts in the subsequent years.”¹⁴¹ And as Kamisar demonstrates in his most recent article on *Miranda*, the so-called “conservative” majority on the Rehnquist Court “is unwilling to take *Miranda* very seriously.”¹⁴²

Notwithstanding these practical realities, some judges and legal scholars insist that *Miranda* was (and remains) an illegitimate ruling. For example, Justice Scalia has asserted that:

Miranda was objectionable for innumerable reasons, not least the fact that cases spanning more than seventy years had rejected its core premise that, absent the warnings and an effective waiver of the right to remain silent and of the (hitherto unknown) right to have an attorney present, a statement obtained pursuant to custodial interrogation was necessarily the product of compulsion.¹⁴³

Justice Scalia has also opined that “what is most remarkable about the *Miranda* decision—and what made it unacceptable as a matter of straightforward constitutional interpretation in the *Marbury*¹⁴⁴ tradition—is its palpable hostility toward the act of confession *per se*, rather than toward what the Constitution abhors, *compelled* confession.”¹⁴⁵ In a similar vein, the late Joe Grano wrote that “the rights that *Miranda* created were unprecedented in federal constitutional law,”¹⁴⁶ and Professor Gerald Caplan has complained that “with one stroke, the [*Miranda*] Court boldly and improperly resolved the contradictions in the law of confessions by giving it a single focus—the protection of the suspect.”¹⁴⁷

¹³⁹ Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 436 (1987).

¹⁴⁰ 530 U.S. 428 (2000).

¹⁴¹ Yale Kamisar, *A Look Back on a Half-Century of Teaching, Writing and Speaking About Criminal Law and Criminal Procedure*, 2 OHIO ST. J. CRIM. L. 69, 88 (2004).

¹⁴² Yale Kamisar, *Postscript: Another Look at Patane and Seibert, the 2004 Miranda “Poisoned Fruit” Cases*, 2 OHIO ST. J. CRIM. L. 97, 114 (2004). The conservative majority are: Chief Justice Rehnquist, Justices O’Connor, Scalia, Kennedy and Thomas.

¹⁴³ *Dickerson*, 530 U.S. at 448 (Scalia, J., dissenting) (citations omitted).

¹⁴⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹⁴⁵ *Dickerson*, 530 U.S. at 450 (Scalia, J., dissenting) (citations omitted).

¹⁴⁶ GRANO, *supra* note 83, at 120.

¹⁴⁷ Caplan, *supra* note 37, at 1469 (footnote omitted).

These complaints are wide of the mark.¹⁴⁸ *Gatehouses and Mansions* plainly demonstrates that *Miranda* did not come out of nowhere. More importantly, Kamisar's article establishes that the legal principles that justified the result in *Miranda* were securely anchored in constitutional law. A complete reading of *Gatehouses and Mansions* provides a powerful counterweight to critics who charge that *Miranda* is an illegitimate constitutional ruling. Unfortunately, many law students (and probably a few law professors) will only read the redacted version of *Gatehouses and Mansions*.¹⁴⁹ True, the redacted version contains Kamisar's brilliant metaphors and compelling writing about the "de facto inquisitorial system which has characterized our criminal procedure for so long."¹⁵⁰ But the redacted article does not provide the reader with Kamisar's analysis of *Escobedo*, nor does the redacted article contain Kamisar's development of the "equality norm" that was a crucial component of the constitutional analysis that supports *Miranda*.¹⁵¹ Only by reading the *entire* article is one exposed to Kamisar's vision and knowledge about constitutional law.

Having read *Gatehouses and Mansions* several times, I now believe that the best parts of the article—"the straightforward constitutional [parts] in the *Marbury* tradition"¹⁵²—are omitted from the version that most law students and members of the legal profession will read. That is too bad, because without having read those sections of Kamisar's essay, one can never fully appreciate the wisdom and constitutional legitimacy of *Miranda*. It is like watching the last three minutes of Super Bowl III without having known about Broadway Joe's pre-game "guarantee."

¹⁴⁸ For replies to these criticisms of *Miranda*, see *Thirty-Five Years Later*, *supra* note 24 (reply to Justice Scalia's dissent in *Dickerson*); Thomas, *supra* note 36 (critique of Grano's book); Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1 (1986) (responding to Professor Caplan).

¹⁴⁹ See MODERN CRIMINAL PROCEDURE, *supra* note 22, at 432–36; POLICE INTERROGATION, *supra* note 26, at 27–40.

¹⁵⁰ POLICE INTERROGATION, *supra* note 26, at 32.

¹⁵¹ At her Senate confirmation hearings, Justice Ginsburg recognized and supported this aspect of *Miranda*. "[*Miranda* warnings provide] an assurance that people know their rights. It is an assurance that the law is going to be administered even-handedly because, as I said, sophisticated defendants who have counsel ordinarily will know about their rights.'" Kamisar, *supra* note 10, at 8 (quoting *The Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States, Hearings on S. 103-482 Before the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. 327 (1993)).

¹⁵² *Dickerson*, 530 U.S. at 450 (Scalia, J., dissenting).